STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2008
v	No. 276295 Saginaw Circuit Court
JAMES EDWARD DURAN, Defendant-Appellant.	LC No. 04-025015-FH

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b) (force or coercion). The court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 180 to 360 months' imprisonment. Defendant appeals as of right. Because defendant was not denied the effective assistance of counsel by counsel's failure to raise an insanity defense, defendant did not provide any articulable facts to support his belief that the victim's mental health records were relevant to the victim's credibility, the prosecutor did not engage in any misconduct, the trial court did not err in scoring 25 points for offense variable 11, and because defendant's sentences, which fell within the minimum sentence range of the legislative guidelines, were based on accurate information, we affirm.

Defendant claims that he was denied the effective assistance of counsel when defense counsel failed to raise an insanity defense based on involuntary intoxication. Because no *Ginther*[1] hearing was held, this Court's review of defendant's claim is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). In order to establish a claim of ineffective assistance, a defendant must prove that "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

[1] *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

Insanity is an affirmative defense to a crime if defendant can show that because of mental illness or mental retardation, he "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his . . . conduct or to conform his . . . conduct to the requirements of the law." MCL 768.21a(1). While voluntary intoxication cannot form the basis of an insanity defense, MCL 768.21a(2), involuntary intoxication is a complete defense to a crime if it makes the defendant temporarily insane within the meaning of MCL 768.21a(1). *People v Wilkins*, 184 Mich App 443, 449; 459 NW2d 57 (1990). "Involuntary intoxication is intoxication that is not self-induced and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant." *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992) (internal quotations and citation omitted). No record evidence shows that defendant unknowingly consumed alcohol. Rather, the record shows that defendant knowingly drank five or six beers the night of the sexual assault.

Involuntary intoxication may also include "pathological intoxication," a self-induced intoxication "in the sense that the defendant knew what substance he was taking, but which was 'grossly excessive in degree, given the amount of the intoxicant.'" LaFave, Criminal Law (2d ed), § 4.10(f), p 394. "[T]he intoxication is involuntary only if the defendant was unaware that he is susceptible to an atypical reaction to the substance taken. The mere fact the defendant is an alcoholic or addict is not sufficient to put his intoxicated or drugged condition into the involuntary category." *Id.* According to the presentence report, defendant first began drinking alcohol at the age of 14 and he drank alcohol one or two times a week. Nothing in the record even hints at the possibility that defendant was unaware that he was susceptible to an atypical reaction to the voluntarily consumed alcohol.[2] Likewise, no record evidence suggests that defendant had "reached the stage where even the taking of the first drink [was] not a matter of choice" or that, because of his past substance abuse, defendant's brain functions were so destroyed that he could not appreciate the wrongfulness of his actions.

Given the complete absence of any evidence to suggest that defendant's consumption of the five or six beers on the night of the sexual assault resulted in involuntary intoxication, defendant has not shown that counsel's failure to raise an insanity defense fell below an objective standard of reasonableness. *Odom, supra*.[3] Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant was not denied the effective assistance of counsel.

Defendant next claims that the trial court erred in refusing to disclose the victim's mental health records. A trial court's decision on a discovery request is reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Cline*, 276 Mich App 634, 647; 741 NW2d 563 (2007).

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[2] On a more basic note, nothing in the record suggests that defendant even had an atypical reaction to the five or six beers he knowingly consumed.

[3] For this same reason—the complete absence of evidence to suggest involuntary intoxication—we decline defendant's request to remand for an independent evaluation.

After defendant requested the mental health records of the victim, the trial court, pursuant to MCR 6.201(C)(2), conducted an in camera review of the records. Finding that the records were irrelevant and contained no exculpatory evidence favorable to defendant, the trial court refused to disclose the records to defendant. However, contrary to MCR 6.201(C)(2)(d), the trial court failed to seal and preserve the records for appellate review. Consequently, we are unable to review whether the trial court abused its discretion in finding that the records were irrelevant.

Nonetheless, remand for retrieval of the records is unnecessary. Defendant has no right to discover information protected by constitution, statute, or privilege. MCR 6.201(C)(1). However, "[i]f a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense," the trial court shall inspect the records in camera. MCR 6.201(C)(2); see also *Fink, supra* at 455. A general request for privileged documents, without any further articulable facts as to why such information is necessary to the preparation of the defendant's case, does not warrant in camera review. *People v Stanaway*, 446 Mich 643, 681; 521 NW2d 557 (1994).

Citing the victim's preliminary examination testimony that she was currently seeing a mental health counselor, defendant sought disclosure or an in camera review of the victim's mental health records, claiming that the records were relevant to the victim's credibility and necessary to establishing a proper defense. Defendant, in his motion, however, provided no articulable facts to support any belief that the victim's mental health records would contain any information relevant to the victim's credibility in the present case. In fact, defendant did not even provide a statement of what he believed would be contained within the records.[4] Disclosure of requested documents should not occur if the record reflects the party seeking disclosure "is on a fishing expedition to see what may turn up." *Id.* at 680 (internal quotations and citation omitted). Accordingly, because defendant failed to meet the requirements necessary to justify an in camera review of privileged records, we affirm the trial court's order refusing the disclosure of the victim's mental health records. See *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998) (this Court will affirm a trial court's ruling when the court reaches the right result, albeit for the wrong reason).[5]

Defendant also claims that the prosecutor engaged in misconduct during his closing statement when he argued facts not in evidence, appealed to the jury to sympathize with the victim, shifted the burden of proof, and disparaged defense counsel. Because defendant did not assert timely objections at trial, the alleged misconduct is reviewed for plain error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant first alleges that the prosecutor argued facts not in evidence when he stated that, according to the DNA analysis of the DNA found in the victim, the chances of the DNA

[4] No such statement has been provided on appeal either.

[5] Because defendant failed to show that the victim's mental health records were likely to contain information necessary to his defense, defendant's claim that, without disclosure of the records, he was unable to effectively cross-examine the victim is without merit.

coming from someone other than defendant in the African-American population was one in 2.3 quintillion. A prosecutor may not argue facts not admitted into evidence. *People v Watson*, 245 Mich App 572, 589; 629 NW2d 411 (2001). However, the DNA analysis was included within Exhibit 1, which had been admitted into evidence by the trial court. Thus, the prosecutor did not argue facts not in evidence. Regardless, the statement did not prejudice defendant because defendant admitted that he had sexual intercourse with the victim.

Defendant next argues that the prosecutor's remarks about honor killings, TV jokes of sexual exploits, and popular culture were improper because the remarks invited the jury to sympathize with the victim. According to defendant, the remarks were also inflammatory and the prosecutor intentionally injected them to create prejudice against him. Statements asking the jury to sympathize with a victim are improper. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). But, contrary to defendant's argument, the cited statements, taken in context, were an appeal to the jury to take an objective look at the evidence and not to be swayed by its sympathies. Indeed, the prosecutor specifically asked the jury to "do justice in this case based on the facts, based on the evidence and the law." In addition, the comments about honor killings were not an attempt to inflame prejudice against defendant based on religion or race. See *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). Rather, the comments put the case into the context of American society and the American judicial system. Even if the remarks were improper, defendant has not established that any resulting prejudice could not have been cured with a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

Defendant also alleges that the prosecutor shifted the burden of proof with remarks regarding defense counsel's trial tactics. Taken as a whole, however, the challenged remarks were no more than the prosecutor's commentary on the validity of the defense's theory of the case. These types of comments do not impermissibly shift the burden of proving innocence to defendant where defendant has advanced the alternative theory, which, if true, would exonerate defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Moreover, the prosecution's comments were in response to issues raised by defense counsel. Improper prosecutorial remarks generally do not require reversal if the prosecutor is responding to issues raised by the defense. *Watson, supra* at 593.

Finally, defendant alleges that the prosecutor made an improper personal attack on defense counsel. It is improper for the prosecutor to personally attack opposing counsel. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The challenged remarks do not constitute an attack on defense counsel. Rather, the remarks portray counsel as an aggressive attorney vigorously defending his client. Regardless, the prosecutor's comment not to hold defense counsel's personality against defendant prevented any improper prejudice from arising.

Defendant next claims the trial court erred in scoring 25 points for offense variable (OV) 11, MCL 777.41. This Court will uphold a scoring decision for which there is any evidence in support. *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005). Matters concerning the application and interpretation of the sentencing guidelines are questions of law reviewed de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

Twenty-five points may be scored for OV 11 if "[o]ne criminal sexual penetration occurred." MCL 777.41(1)(b). In determining the number of points to be scored under OV 11, a court is to score "[a]ll sexual penetrations of the victim by the offender arising out of the

sentencing offense." MCL 777.41(2)(a). The penetration that formed the basis for the CSC III conviction is not to be scored. MCL 777.41(2)(c). In *People v Mutchie*, 251 Mich App 273, 280-281; 650 NW2d 733 (2002), aff'd on other grounds 468 Mich 50 (2003), this Court interpreted MCL 777.41(2)(c) as:

> bar[ing] use of only the one sexual penetration that forms the basis of [the CSC III] conviction, when that offense is itself the sentencing offense. All other sexual penetrations of the victim and by the offender "arising out of the sentencing offense" may be scored under MCL 777.41(2)(a), regardless of whether the sexual penetrations result in separate convictions.

Because the two sexual penetrations perpetrated by defendant on the victim "occurred at the same place, under the same set of circumstances, and during the same course of conduct," regardless of which CSC III conviction is deemed the "sentencing offense," the other sexual penetration fell within the scope of "sexual penetrations of the victim by the offender arising out of the sentencing offense." *Id.* at 277. Accordingly, the trial court did not abuse its discretion in scoring 25 points for OV 11.

Defendant also claims the trial court's scoring of OV 11 violates his right to jury as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has definitively ruled that *Blakely* does not affect Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 684; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

In his last claim, defendant argues that his sentence should be vacated because the sentence is cruel and unusual punishment, disproportionate to the offense and the offender, and is based on inaccurate information. This Court reviews unpreserved sentencing errors for plain error affecting the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003).

Defendant does not contest that his minimum sentences of 180 months' imprisonment fell within the recommended minimum sentence range under the legislative guidelines.[6] Accordingly, we are required to affirm defendant's sentences unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10). We have already rejected defendant's argument that the trial court erred in scoring OV 11. We now reject defendant's argument that the trial court, because it failed to assess defendant's rehabilitative potential through substance abuse and psychiatric treatment, contrary to MCR 6.425(A)(5), relied on inaccurate and incomplete information when it sentenced defendant. MCR 6.425(A)(5) only requires a probation officer to include in the presentence report a description of defendant's medical history, substance abuse history, and, if applicable, a current psychiatric report.

[6] A trial court must articulate its reasons for imposing a sentence on the record. The trial court met the articulation requirement when it relied upon the sentencing guidelines in imposing defendant's sentence. See *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). In addition, the trial court stated it based the length of the sentences on deterrence, rehabilitation, protection of society, and punishment.

Defendant's use of alcohol and marijuana, along with his prior substance abuse treatment, was documented in the presentence report. A presentence report is presumed to be accurate, and the trial court may rely on the report unless effectively challenged by the defendant. *Callon, supra* at 334. Defendant did not challenge the accuracy of the presentence report below, nor does he on appeal. Accordingly, defendant has failed to show the trial court relied on inaccurate information when it sentenced him. We, therefore, affirm defendant's sentence.[7]

In affirming defendant's sentence, we reject his argument that his sentence was not proportionate and was, therefore, cruel or unusual punishment. While MCL 769.34(10) does not preclude appellate relief for sentencing errors of constitutional magnitude, *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006), a minimum sentence falling within the guidelines range is presumed to be proportional, *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). A proportional sentence is not cruel and unusual punishment. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). Defendant has failed to present any evidence to rebut the presumption of proportionality.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

[7] Defendant's argument that, pursuant to 5K2.13 of the Federal Sentencing Guidelines, the trial court should have departed downward from the recommended minimum sentence range is without merit. Defendant was not sentenced under the federal guidelines.